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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-9

STATE OF WASHINGTON, *et al.*,

Appellants,

v.

SEATTLE SCHOOL DISTRICT No. 1, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

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MOTION FOR LEAVE FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., TO FILE A BRIEF AMICUS CURIAE

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The NAACP Legal Defense and Educational Fund, Inc., hereby respectfully moves for leave to file the attached brief amicus curiae in this case. Counsel for appellees, the United States, and the Seattle intervenor-plaintiffs-appellees

have consented to the filing of the attached brief. The consent of the attorney for appellants was requested, but refused, thus necessitating this moion.

1. The NAACP Legal Defense and Educational Fund, Inc., (hereinafter "LDF") is a non-profit corporation established under the laws of the State of New York. It was formed to assist black persons to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal services gratuitously to black persons suffering injustice by reason of racial discrimination. LDF is independent of other organizations and is supported by contributions from the public.

2. For many years attorneys of the Legal Defense Fund have represented parties in litigation before this Court and

the lower courts involving a variety of race discrimination issues, including lawsuits brought on behalf of black parents and students to desegregate public schools. E.g., Brown v. Board of Education, 347 U.S. 483 (1954); Cooper v. Aaron, 358 U.S. 1 (1958); Green v. County School Board, 391 U.S. 430 (1968); Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); Keyes v. School District No. 1, 413 U.S. 189 (1973). The Legal Defense Fund also has participated as amicus curiae in numerous desegregation cases in this Court. E.g., Columbus Board of Education v. Penick, 443 U.S. 449 (1979); Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

3. Amicus also represents black parents and school children in numerous pending lower court cases. Those parents and children have a particular interest and concern in encouraging local school districts to undertake voluntary "affirmative action" programs to desegregate their student bodies and facilities without undergoing full-blown litigation, which is often taxing, time-consuming and expensive. LDF also has an interest in safeguarding the right of black parents and other black citizens, as exercised here, to seek redress of grievances and to obtain favorable governmental action through the political process on the same basis as all other citizens. As the attached brief points out, amicus believes that both these interests will be imperiled if Initivive 350 is upheld.

4. Amicus respectfully submits that its long experience in school desegregation matters and its familiarity with the social-science data on the success of desegregation remedies may assist the Court in resolving this matter.*/

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*/ The sole objection of appellants' counsel to LDF's participation as amicus -- that LDF's perspective is represented here by the Seattle, Washington Branch of the National Association for the Advancement of Colored People (NAACP), one of several plaintiff-intervenors -- is mistaken. Although originally founded by the NAACP, LDF has been a wholly separate organization from the NAACP for over 20 years, with a separate Board of Directors, program of operations, staff, office and budget. Moreover, while the NAACP is participating in this case solely on behalf of its members in Seattle, Washington, LDF seeks to participate in order to represent the interests of its clients in school desegregation litigation throughout the country. For these reasons, LDF has been permitted to participate as amicus curiae in cases in which the NAACP was also amicus, e.g., Regents of the University of California v. Bakke, supra, and in cases in which NAACP attorneys represented one of the parties, e.g., Columbus Board of Education v. Penick, supra; New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980).

WHEREFORE, for the foregoing reasons, amicus curiae NAACP Legal Defense and Educational Fund, Inc. prays that the attached brief be permitted to be filed.

Respectfully submitted,

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QUESTION PRESENTED

Does Initiative 350 violate the Fourteenth Amendment by structuring the political process of the State of Washington so that governmental action benefiting the minority victims of school segregation is more difficult to achieve than governmental action benefiting all other citizens?

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BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS AMICUS CURIAE

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SUMMARY OF ARGUMENT

Amicus respectfully submits that this appeal is governed by the fundamental Fourteenth Amendment principle that a state must maintain political neutrality among the races and may not burden minority-group political participation by requiring racial

minorities to utilize more onerous means than all other citizens to obtain governmental action on their behalves. Hunter v. Erickson, 393 U.S. 385 (1969); Nyquist v. Lee, 401 U.S. 935 (1971), aff'g 318 F. Supp. 710 (W.D.N.Y. 1970). The fatal constitutional defect of Initiative 350 is that it is a "statute[] which structure[s] the internal governmental process" in such a way as to "make[] it more difficult for racial ... minorities" than for all other citizens to "further their political aims." Hunter v. Erickson, supra, 393 U.S. at 393 (Harlan, J., concurring). Because Hunter and Nyquist v. Lee are dispositive, we limit Part I of this brief to a discussion of the application here of the principle which animates those cases.

Part II briefly discusses the recent social scientific data establishing that desegregation of public schools is a

legitimate, indeed pressing, political goal of minorities, which has succeeded over the past fifteen years in dramatically improving academic achievement among blacks and race relations among all students.

ARGUMENT

I

INITIATIVE 350 VIOLATES THE FOURTEENTH AMENDMENT'S MOST BASIC PROHIBITION BY STRUCTURING THE POLITICAL PROCESS SO THAT GOVERNMENTAL ACTION BENEFITING THE MINORITY VICTIMS OF SCHOOL SEGREGATION IS MORE DIFFICULT TO ACHIEVE THAN GOVERNMENTAL ACTION BENEFITING ALL OTHER CITIZENS

In its most fundamental aspect, the Equal Protection Clause of the Fourteenth Amendment forbids the States from passing laws, not born of a compelling necessity, that classify blacks or other racial minorities differently, and less ad-

vantageously, than all other citizens, Slaughterhouse Cases, 83 U.S. 36, 71 (1873); Strauder v. West Virginia, 100 U.S. 303, 307-08 (1880); Ex parte Virginia, 100 U.S. 339, 344-45 (1880); Bolling v. Sharpe, 347 U.S. 499 (1954); McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Loving v. Virginia, 388 U.S. 1, 10 (1967). This deep mistrust of legislative classifications singling out blacks or other racial minorities derives from a recognition that "prejudice against discrete and insular minorities" in this country historically has been "a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities ...." United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). Because the Clause was designed as an antidote to the "position

of political powerlessness ... [in] the majoritarian political process" to which blacks and other racial minorities have been relegated in this country, San Antonio School Dist. v. Rodriquez, 411 U.S. 1, 28 (1973),[1/] its prohibitory force falls heavily, perhaps most heavily, on "laws which define the structure of political institutions" so as to classify racial minorities less advantageously than all other citizens. Hunter v. Erickson, 393 U.S. 385, 393 (1969) (Harlan, J., concurring); see Mobile v. Bolden, 446 U.S. 55, 83-84 (1980) (Stevens, J., concurring); see e.g., White v. Regester, 412 U.S. 755 (1973); Nixon v. Herndon, 273 U.S. 536 (1927).

1/ See Foley v. Connelie, 435 U.S. 291, 294 (1978); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 313 (1976); In re Griffiths, 413 U.S. 717, 721 (1973); Takahashi v. Fish and Game Comm'n, 334 U.S. 410, 420 (1948).

A. Racial Classifications Distorting the Political Process

Forbidden racial classifications impinging on the political process include, for example, the simple denial to blacks and other racial minorities of the franchise available to all other citizens. Cf. Dunn v. Blumstein, 405 U.S. 330 (1972); Harper v. Virginia Board of Electors, 383 U.S. 663 (1966).[2/]

Similarly, it is fundamental to the Equal Protection Clause that the States may not unfavorably single out blacks or other minorities in the political arena by weighting their votes less heavily than

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2/ Such a classification is no less obnoxious to the Fourteenth Amendment because it disadvantages only some members of a racial minority -- for example, by depriving only blacks who wish to vote in the Democratic Party primary of the ability to do so. E.g, White v. Regester, supra; Nixon v. Herndon, supra.

the votes of all other persons -- for example, by affording blacks only one representative for every 10,000 citizens, while affording others one representative for every 5,000 citizens. Cf. Avery v. Midland County, 390 U.S. 474 (1968).[3/]

Finally, even where blacks and other minorities are allowed the franchise and representation equal to that afforded other citizens, this Court has recognized that the States offend the Fourteenth Amendment's fundamental requirement of political neutrality among the races when they pass "statutes which structure the internal governmental process" so as to "make[] it more difficult for racial and religious minorities [than for the rest of

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3/ Again, such a classification violates the Fourteenth Amendment even if it does not victimize all blacks but only, for example, blacks living in urban areas. Cf. Reynolds v. Sims, 377 U.S. 533 (1964).

the citizenry] to further their political aims." Hunter v. Erickson, supra, 393 U.S. at 393 (Harlan, J., concurring) (emphasis added). For minority citizens are no less politically powerless with the vote than without it if the State has arranged the internal mechanics of government so that legitimate state action benefiting racial minorities is structurally more difficult to achieve than state action benefiting other constituencies. See Mobile v. Bolden, supra, 446 U.S. at 83-84 (Stevens, J., concurring).

In this light, for example, a state law requiring a two-thirds majority for legislation benefiting blacks, where a simple majority suffices for all other legislation, would clearly fall afoul of the Fourteenth Amendment. So, too, would a state law singling out only some blacks, or some substantive area of governmental

benefit of particular interest to some blacks, for disadvantageous treatment in the political process. Such was the holding of Hunter v. Erickson, supra.

B. Hunter v. Erickson

In Hunter the municipal lawmaking process in Akron, Ohio had in the past been structured so that the City Council could adopt any municipal ordinance relating to a legitimate goal of local government -- including, for example, the regulation of real-property transactions -- by a majority vote, subject to a citizens' veto if (i) 10 percent of the electorate signed a petition calling for a referendum on the ordinance, and (ii) a majority of the City's electorate thereafter disapproved the ordinance in a general election. See 393 U.S. at 387; id. at 393-94 (Harlan, J., concurring).

Hunter involved a constitutional challenge to a city-charter amendment, legislated by referendum, that partially rearranged this structure. Under the amendment, "[a]ny ordinance which regulate[d] the use, sale [or] lease ... of real property of any kind ... on the basis of race, color, religion, national origin or ancestry" not only had to secure the votes of a majority of the City Council, but also had to "be approved by a majority of the electors voting on the question at a regular or general election ...." Id. at 387. All other municipal laws -- i.e., ordinances not regulating the sale or lease of real property, and those regulating the sale or lease of real property on some basis other than race -- remained subject to the preexisting, less onerous legislative process.

The Court held that the charter amendment violated the Fourteenth Amendment. In so doing, both Justice White for the Court and Justice Harlan in concurrence noted that the charter amendment (i) was designed to rescind a fair-housing ordinance passed by the City Council in order to relieve racial and religious minorities of housing discrimination, and (ii) served to make the passage of municipal legislation by the City Council more difficult in the future by placing more power directly in the hands of the electorate, and less in the hands of the city government. But, as Justice Harlan's concurrence makes explicit, it was neither of these facts alone that rendered the amendment unconstitutional.[4/] Rather, the

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4/ In the first place, that blacks and religious minorities had utilized the

law was unconstitutional because, by way

4/ continued

pre-existing political process to benefit themselves by extending their statutory civil rights beyond what federal law required did not render unconstitutional the subsequent rescission of that action through exercise of the same general political process:

> Statutes ... which are grounded upon general democratic principle, do not violate the Equal Protection Clause simply because they occasionally operate to disadvantage Negro political interests. If a governmental institution is to be fair, one group cannot always be expected to win. If the [Akron City] Council's fair housing legislation were defeated at a referendum, Negroes would undoubtedly lose an important political battle, but they would not thereby be denied equal protection.

Hunter v. Erickson, supra, 393 U.S. at 394 (Harlan, J., concurring). Accord, id. at 390 n.5 (majority opinion). See Dayton Board of Education v. Brinkman, 433 U.S. 406, 413-14 (1977) (school board's rescission of a prior board's resolution

of a nonneutral subject-matter classification, it required minorities seeking legislative protection from housing discrimination to surmount a referendum hurdle that stood in the way of no other

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4/ continued

initiating affirmative action to undo de facto segregation does not by itself violate the Fourteenth Amendment).

Similarly, were a state or local government to organize itself so that legislation, or even some racially neutral species of legislation -- say that regulating all real estate transactions -- is always difficult to pass, such a governmental structure would not necessarily violate the Constitution even though it might have the effect of hampering efforts by blacks to pass fair-housing legislation. Such a rule

> obviously does not have the purpose of protecting one particular group to the detriment of all others. It will sometimes operate in favor of one faction, sometimes in favor of another.

Hunter v. Erickson, 393 U.S. at 394 (Harlan J., concurring).

general, or even housing-related, legislation.[5/]

5/ Notably, the Akron law struck down in Hunter was facially neutral, since it subjected ordinances regulating real estate transactions "on the basis of race" to the same before-the-fact referendum requirement whether they benefited whites or blacks. The Court concluded, however, that the law's facial neutrality was a transparent disguise for a nonneutral classification drawn purely and clearly along racial lines:

> [A]lthough the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that. Like the law requiring specification of candidates' race on the ballot, Anderson v. Martin, 375 U.S. 399 (1964), [the Akron charter amendment] places special burdens on racial minorities within the governmental process. This is no more permissible than denying them the vote on an equal basis with others. The preamble to the open housing legislation which was suspended by [the charter amendment] ... recited that the population of Akron consists

Because "the city of Akron ha[d] not attempted to allocate governmental power

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5/ continued

> of "people of different race, color, religion, ancestry or national origin, many of whom live in circumscribed and segregated areas, under substandard, unhealthful, unsafe, unsanitary and overcrowded conditions, because of discrimination in the sale, lease, rental and financing of housing." Such was the situation in Akron. It is against this background that the referendum required by [the charter amendment] ... must be assessed.

Hunter v. Erickson, supra, 393 U.S. at 391 (citations omitted).

Since the classification covertly drawn by the law was based upon race (as well as ethnicity and religion) alone, and was not justified by a compelling necessity, the Court concluded that it violated the Equal Protection Clause without reference to the Akron electorate's motivation for drawing it. Id. at 389 ("we need not rest on [the Court's invidious-purpose cases] to decide this case. Here, unlike [in those cases], there was an explicitly racial classification treating racial housing matters different from other racial and housing matters"); id. at 395 (Harlan, J., concurring). As the Court

on the basis of any general principle," Hunter v. Erickson, supra, 393 U.S. at 394 (Harlan, J., concurring), or to provide "a political structure that treats all individuals as equals," Mobile v. Bolden, supra, 446 U.S. at 84 (Stevens, J., concurring), but instead passed "a provision that ha[d] the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest," the charter amendment violated the Fourteenth Amendment in the absence of a compelling justification. Hunter v.Erickson, 393 U.S. at 394 (Harlan, J., concurring).

5/ continued

subsequently reiterated in Personnel Administrator v. Feeney, 442 U.S. 256, 274 (1979), it is only "[i]f the classification itself, covert or overt, is not based upon [race]" that the courts must reach "the second question ... whether the adverse effect reflects invidious [race-] based discrimination" (emphasis added).

Hunter established that, while members of the political majority are free to (i) utilize governmental processes organized along a "general principle" to rescind state action benefiting racial minorities,[6/] and (ii) to subject themselves and all others, including racial

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6/ Of course, the invidiously motivated rescission of a prior benefit to minorities does violate the Constitution. Such is the case of Proposition 1 in California. See Crawford v. Board of Education of the City of Los Angeles, No. 81-38.

Similarly, state and local governments guilty of prior racial discrimination have a continuing affirmative duty to remedy its consequences and accordingly are not constitutionally free to withdraw rights or benefits serving that remedial purpose. E.g., Columbus Board of Education v. Penick, 443 U.S. 449, 459 (1979); Wright v. Council of the City of Emporia, 407 U.S. 451 (1972). In advance of Phase II of the present litigation, we assume for purposes of argument that neither the State of Washington, nor any of the other municipal governments involved, is guilty of prior racial discrimination.

Notably, a finding that Initiative 350 is unconstitutional would probably remove any need for Phase II, since

minorities, to an arduous process of securing legislation or other governmental action beneficial to themselves, including by rearranging governmental power so that more of it resides at one level (e.g., with the electorate) and less at another (e.g., with local governmental officials), members of the majority may not pass a law depriving racial minorities of the benefits of the political process by subjecting minorities, but not themselves, to structural or other political disabilities. Such a law is not "grounded in

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6/ continued

Seattle's voluntarily adopted desegregation plan moots any need for court-ordered measures. On the other hand, under Penick and Wright, supra, Initiative 350 cannot finally be adjudged constitutional until after Phase II determines whether (i) the State of Washington or Seattle is under a continuing duty to desegregate the schools of Seattle, and (ii) whether the Initiative interferes with that duty. See North Carolina State Board of Education v. Swann, 402 U.S. 43 (1971).

in neutral principle." Hunter v. Erickson, 393 U.S. at 395 (Harlan, J., concurring). By dividing the political process along racial lines, it cements into the political structure of the State the same "special condition" -- i.e., a "prejudice against discrete and insular minorities ... which tends to curtail the operation of the political process ordinarily to be relied upon to protect minorities," United States v. Carolene Products Co., supra, 304 U.S. at 152 n.4 -- whose existence justifies the Fourteenth Amendment's "extraordinary protection" of blacks and other minorities "from the majoritarian political process." San Antonio School Dist. v. Rodriquez, supra, 411 U.S. at 28.

The requirement that state political processes be racially neutral is no Fourteenth Amendment fellow traveler. It

is compelled by the same "basic principles," Hunter v. Erickson, 393 U.S. at 396 (Harlan, J., concurring), lying at the "core of the Fourteenth Amendment," id. at 391 (majority opinion), that demand that racial minorities be afforded the same right to vote, and the same level of political representation, as all other citizens. See G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 691-707 (9th Ed. 1975). Whatever other goals the Equal Protection Clause is designed to achieve, at the very least it demands "the prevention of meaningful and unjustified official distinctions based on race," and particularly those distinctions disadvantaging racial minorities in the political process. Hunter v. Erickson, supra, 393 U.S at 391.

C. Nyquist v. Lee

In Nyquist v. Lee, 401 U.S. 935 (1971), aff'g 318 F. Supp. 710 (W.D. N.Y. 1970), the Court reaffirmed these principles in a context involving the uneven, subject-matter-specific realignment of political power -- not, as in Hunter, between local municipal officials and the electorate, but between state and local public-school officials.

In New York (unlike in most American states, see Milliken v. Bradley, 418 U.S. 717, 742 & n.20 (1974)), authority over the public schools largely belongs to state, rather than local, education officials. Thus, the Board of Regents of the University of the State of New York, and its chief executive officer, the Commissioner of Education, have long had "the authority to order local school boards to act in accordance with state

educational policies formulated by the Board of Regents." Lee v. Nyquist, 318 F.Supp. at 719. As in Hunter, with regard to housing in Akron, the racial minorities before the Court in Lee had succeeded in the past in convincing these officials to adopt "a policy of eradicating de facto segregation" in the public schools of New York. Id. at 716.[7/] Despite "considerable local resistance," the Regents and Commissioner of Education enforced this policy by ordering local school boards to reassign students to assure racial balance in the schools. Id.

7/ "[S]chool authorities have wide discretion in formulating school policy, and ... as a matter of educational policy ... may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements." North Carolina Board of Education v. Swann, 402 U.S. 31, 45 (1971); accord, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971).

The opponents of mandatory desegregation in New York secured legislation rescinding such orders. As in Hunter, however, this goal was not accomplished by simply reversing the same political process that minorities had previously used to secure state-imposed anti-segregative measures. Nor was it accomplished by generally rearranging the political process to make action by state education officials, including action beneficial to the victims of de facto segregation, more difficult to achieve, for instance by forcing state officials generally to share authority with local ones.

Instead, as in Hunter, the opponents of state-mandated desegregation adopted a subject-matter-specific law providing that any action regarding student assignment "on account of race, creed, color or

national origin" would require, in addition to the approval of state officials, "the express approval of a [local] board of education having jurisdiction, a majority of the members of such board having been elected ...."[8/] Lee v.

8/ As in Hunter, the law struck down in Lee on its face was racially neutral, since race-conscious reassignment of students to benefit whites was subjected to the same special hurdles as reassignment to benefit blacks. However, as in Hunter, see note 5, supra, the Lee Court recognized, given the statute's genesis in "local resistance" to past integrative student-assignment plans, that the statute effectively embodied an "explicitly racial classification" affording the educational interests of the black victims of de facto segregation less favorable treatment than the educational interests of all other citizens. Lee v. Nyquist, supra, 318 F. Supp. at 718. As in Hunter, the law was accordingly held unconstitutional irrespective of the motivation of its proponents. Id.

In view of Lee, and the other cases applying Hunter in school-segregation contexts, e.g., Evans v. Buchanan, 393 F. Supp. 428, 440-41 (D.Del.)(3-judge court), aff'd, 423 U.S. 963 (1975)(citing cases), the Government's suggestion that

Nyquist, supra, 318 F.Supp. at 712. While giving local officials authority over this

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8/ continued

the Fourteenth Amendment prohibition enunciated in Hunter is limited to non-neutral laws discouraging efforts to end de facto housing segregation, and does not apply to nonneutral laws discouraging efforts to end de facto school segregation, is ludicrous. E.g., Brief of the United States, at 17-18. See generally Columbus Board of Education v. Penick, 443 U.S. 449, 465 n.13 (1979)(citing cases) (noting the hand-in-glove relationship between housing and school segregation).

Indeed, the characteristic of efforts to end de facto school segregation on which the Government relies to distinguish this case from Hunter --i.e., that some minorities may not be benefited by such measures, Brief of the United States, at 17-18 -- applies equally in the housing context in Hunter. However, that not all minorities support open housing or integrated schooling does not undermine the conclusion in Hunter, Lee and below that a legislative classification burdening such supporters, but no other citizens, is unconstitutional because those whom it does disadvantage are minorities. Otherwise, for example, the Court's conclusion in Nixon v. Herndon, supra, that a "white Democratic primary" law unconstitutionally disadvantages blacks would be undermined by the fact that many blacks are Republicans, and have no desire to vote in the Democratic primary. See notes 2, 3, supra.

one aspect of educational policy[9/] -- of special interest to the racial minority victims of de facto segregation -- the law left the authority of state officials intact as to all other educational matters, including all other student-assignment matters.

As in Hunter, the Court in Lee found this law unconstitutional under the Fourteenth Amendment because the specific rearrangement of the political system chosen to accomplish the present rescission and future discouragement of

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9/ The law struck down in Lee actually realigned authority over student assignment to alleviate de facto segregation in two ways. In school districts governed by an elected school board, final authority rested with that board. In districts governed by an appointed school board, however, the law withdrew the authority to assign students to alleviate segregation from all (i.e., state and local) education officials, leaving it exclusively in the hands of the state legislature. See Lee v. Nyquist, supra, 318 F. Supp. at 719.

civil-rights-oriented benefits previously conferred on minorities was not racially neutral:

> [The statute] singles out for different treatment all plans which have as their purpose the assignment of students in order to alleviate racial imbalance. The Commissioner and local appointed officials [see note 9, supra] are prohibited from acting in these matters only where racial criteria are involved. The statute thus creates a clearly racial classification, treating educational matters involving racial criteria differently from other educational matters and making it more difficult to deal with racial imbalance in the public schools. We can conceive of no more compelling case for the application of the Hunter principle.

318 F. Supp. at 719 (Hays, J.), aff'd, 401 U.S. 935 (1971).

Lee, like Hunter, lies at the "core" of the Fourteenth Amendment's "protection [of minorities] from the majoritarian

political process." San Antonio School Dist. v. Rodriquez, supra, 411 U.S. at 28. It too strikes down an effort by members of the majority to structure the political process so that the black victims of segregation are once again relegated to the historical position of "political powerlessness" vis a vis all other citizens that the Equal Protection Clause was particularly designed to remedy. Id.

D. Initiative 350

Initiative 350 is a mirror image of the law found unconstitutional in Nyquist v. Lee. Like that law, Initiative 350 was legislated in direct response to a plan (in this case "The Seattle Plan") of "mandatory" student reassignment to achieve greater interracial contact in the schools,[10/] only here the nonneutral

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10/ "Mandatory" is a misnomer. For the citizens of Seattle, through their elected

realignment of power runs from the local to the State level, rather than from the State to the local level, as in Lee.[11/]

In the State of Washington, as in most American jurisdictions (excepting New York), see Milliken v. Bradley, supra, 418 U.S. at 742 & n. 20, the authority to

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10/ continued

representatives on the school board of that district, voluntarily chose to reassign students in order to achieve a greater degree of racial balance. The mandate, that is, came not from a federal court or other agency not directly responsible to the citizens of Seattle, but from those citizens themselves. The term is accurate only in the sense that, as in virtually every public school system in the country, the student assignment plan in Seattle requires that students living in specified areas attend specified schools, rather than allowing each student voluntarily to choose the school he or she attends.

11/ The law in Lee realigned the political process in some districts in New York by removing authority from education officials generally and giving it to the State legislature. See note 9, supra. To this extent, Initiative 350 is an exact, rather than mirror, image of the law struck down in Lee.

operate the public schools and, specifically, to assign students to particular facilities, resides almost exclusively in local school boards. "The law [of Washington] has plainly vested the board of directors of school districts such as this with discretionary powers in such matters." State ex rel. Lukens v. Spokane School District 81, 147 Wash. 467, 474, 266 P. 189, 191 (1928). See Seattle School Dist. No. 1 v. Washington, 473 F. Supp. 996, 1010 (W.D. Wash. 1979) (Finding of Fact 8.2). As the Supreme Court of Washington has expressly held, the Seattle school board was free to adopt a mandatory integration program such as The Seattle Plan in the proper exercise of its broad discretionary power over student assignment. See Citizens Against Mandatory Bussing v. Palmason, 495 P.2d 657, 666

(Wash. 1972).[12/]

Although the Seattle Plan encountered opposition, its opponents did not seek to rescind the Plan through the pre-existing political process. Instead, they found it easier to rearrange that process through adoption of Initiative 350.[13/] 473 F. Supp. at 1006-07 (Findings of Fact 6.3, 7.1-7.5).

12/ In Palmason, the Supreme Court of Washington held, prior to the enactment of Initiative 350, that local school boards in Washington have almost plenary "discretionary power" over student assignments within their districts, subject only to judicial review to determine if such assignments "violate some fundamental right of the party challenging them." 495 P.2d at 660 & nn.3, 4. The Court concluded that a predecessor of "The Seattle Plan" violated no such right. Id. at 662-63.

13/ Previous attempts by opponents of desegregation to recall the pro-integration members of the Seattle school board had failed. 473 F. Supp. at 1006 (Finding of Fact 6.3), aff'd, 633 F.2d 1338, 1346 (9th Cir. 1980).

As in Hunter and Lee, however, the Washington voters who adopted the Initiative did not generally restructure the political process so that all comparable governmental action would be harder to secure in the future. Rather, using a subject-matter classification like those struck down in Hunter and Lee, Initiative 350 rescinded The Seattle Plan and prevented its duplication in the future by non-neutrally realigning the political structure of public education in Washington along lines corresponding to the race of the persons adversely affected. Under the Initiative, the minority victims of de facto school segregation could only secure governmental action relieving that condition from the State legislature or the State electorate at large, although all other citizens remained free to achieve

any other goal of public education or student assignment through local school boards.

The racial classification drawn by Initiative 350 is clear from the face of that provision. Under the Initiative, the citizens of Washington remain free, as before it was adopted, to secure from local school boards: (i) any governmental action affecting public education other than student assignment (Initiative 350, § 1), and any student-assignment action designed to (ii) utilize "the school nearest or next nearest to student's place of residence" (id.), or, regardless of the location of the school facility, to (iii) improve "the course of study" available to students (id.), (iv) provide "special education, care or guidance," including for "students who are physically, mentally

or emotionally handicapped" (id. §§ 1(1), (4)), (v) alleviate transportation difficulties, caused by "health or safety hazards, either natural or man-made, or physical barriers or obstacles, either natural or man-made" (id. § 1(2)), (vi) avoid attendance at facilities that are "unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities" (id. § 1(3)), or (vii) satisfy "most, if not all, of the major reasons for which students are at present assigned to schools other than the nearest or next nearest schools" except for desegregation (453 F. Supp. at 1010, Finding of Fact 8.3).[14/] As its proponents promised the voters of Washington,

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14/ Initiative 350 is not a neighborhood-school law. It leaves intact the local school board's broad discretion to define the curriculur, remedial, health, safety, transportation and space needs of its

Initiative 350 occasions "no loss of [local] school district flexibility other than in busing for desegregation purposes" (473 F. Supp. at 1008, Finding of Fact 7.18), and in no way affects the "99% of the school districts" in Washington (i.e., all but the three respondent districts) that are not now assigning or contemplating the assignment of students

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14/ continued

students, and to assign those students to schools other than those nearest or next nearest their place of residence, if it concludes that any of those needs will be better served by such assignments. Accordingly, even were a neighborhood-school policy compelling enough to justify what otherwise amounts to a constitutional violation -- but see Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S 1, 28 (1971) -- Initiative 350 is designed to achieve no such policy, since as both courts below expressly found, it freely allows local school boards to ignore that goal whenever any educational interest other than racial integration is involved. 453 F. Supp. at 1010 (Finding of Fact 8.3), aff'd, 633 F.3d at 1344 & n.4.

to encourage interracial contact (id. at 1008-09, Finding of Fact 7.9).

Accordingly, the single class subjected by Initiative 350 to the extraordinary political burden of having to obtain statewide legislative or popular approval of local student-assignment proposals suiting its particular needs is composed exclusively of "the black students" in the State of Washington who are victimized by segregation in the public schools. Id. at 1007 (Finding of Fact 6.12), aff'd, 633 F.2d at 1342-44.[15/] Since, as in Hunter and Lee the disadvan-

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15/ The Courts below both found that black citizens living in segregatd neighborhoods in Washington believe that racial integration of the schools would benefit their children. Regardless of whether those citizens are right or wrong (see Section II, infra), the State of Washington may not constitutionally subject them to political hurdles, not applicable to other citizens, that impede their achievement of that goal. In short, the

taged class is defined by the race of its members, the law offends the Equal Protection Clause regardless of the motivation of its proponents.[16/]

15/ continued

social validity of racial integration is not at issue here. What is at issue is the right of black citizens to pursue that legitimate governmental objective through lawful political processes on the same basis as all other citizens are permitted to pursue their legitimate governmental ends.

16/ Much is made by appellants of the fact that the provisions in Hunter and Lee defined the forbidden subject-matter classification in terms of the subject-matter on which a special political burden was placed by the State (i.e., fair-housing regulation in Hunter and student reassignment to achieve integration in Lee), and accordingly used the word "race," while the drafters of Initiative 350 defined the subject-matter classification in terms of all of the subject matters on which the special political burden was not placed (i.e., every use of student reassignment save for integration), and thereby avoided using the word "race." However, it was not the wording of the laws in Hunter and Lee, or even any facial nonneutrality in that wording, that rendered those laws un-

To put it bluntly, members of the political majority in Washington have passed a law requiring racial minorities to seek statewide approval of govermental action on their behalf, while insisting that action on every one else's behalf need only secure the approval of local officials. As a result, the internal

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16/ continued

constitutional. As the Hunter Court noted, those laws on their faces "treat[ed] Negro and white, Jew and gentile in an identical matter." Hunter v. Erickson, supra, 393 U.S. at 391. The Court struck down the laws in Hunter and Lee because it was clear, once the "covert" statutory classifications they created were exposed (see Personnel Administration v. Feeney, 442 U.S. 256, 274 (1979)), that they separated persons for differential treatment along lines that corresponded exactly (rather than only approximately, as in, e.g., Feeney, supra; Village of Arlington Heights v. Metropolitan Housing Authority, 429 U.S. 252 (1977); Washington v. Davis 426 U.S. 229 (1976); and James v. Valtierra, 402 U.S. 137 (1971)) to the race of the persons adversely affected. It is in this sense that the offensive classifications were "explicitly racial," and thus

political processes governing public education in Washington are not organized "on the basis of any general principle," Hunter v. Erickson, supra, 393 U.S. at 395 (Harlan, J., concurring), and do not "treat[] all individuals as equals" regardless of race, Mobile v. Bolden, supra,

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16/ continued

unconstitutional, regardless of the motive for drawing them. Hunter v. Erickson, supra, 393 U.S at 389; see notes 5, 8, supra.

The classification drawn by Initiative 350 is nonneutral and explicitly racial in precisely the same way as the classifications struck down in Hunter and Lee. Indeed, as the district court's factfindings make clear, the classification drawn by Initiative 350 -- between minorities favoring mandatory student assignment to relieve them of racial isolation and all other persons seeking beneficial governmental action relating to education or student assignment -- is identical to the explicitly racial classification struck down in Lee. See 473 F. Supp. at 1008-09 (Findings of Fact 7.8, 7.9, 7.18, 7.19).

Put simply, it was the substance of the laws struck down in Hunter and Lee,

446 U.S. at 84 (Stevens, J., concurring). Rather, they deny the black victims of school segregation the same degree of political protection afforded all other citizens by the laws of the State. This, in its rawest form, is the denial of "the equal protection of the laws." It is unconstitutional under the Fourteenth Amendment.

16/ continued

and it is the identical substance of Initiative 350 -- the correspondence of the classification drawn to the race of the persons adversely affected -- rather than the form or specific wording of those provisions that (barring some compelling justification) render all three unconstitutional irrespective of the motivation of their drafters.

II

RACIAL INTEGRATION OF PUBLIC EDUCATION, WHICH INITIATIVE 350 NON-NEUTRALLY FRUSTRATES, IS A LEGITIMATE, INDEED PRESSING, POLITICAL OBJECTIVE OF BLACK CITIZENS IN APPELLEE SCHOOL DISTRICTS.

While white students often benefit from interracial association, e.g., Regents of the University of California v. Bakke, 438 U.S. 265, 314-15 (1978) (Powell, J.), the courts below found that the persons in fact disadvantaged by Initiative 350 were the black and other minority students living in segregated neighborhoods in appellee districts who, but for the enactment of the Initiative, would be assigned to racially integrated public schools. See 633 F.2d at 1343-44. The parents of these minority students believe that racially integrated public education in their school districts would benefit their children and, prior to

Initiative 350's enactment, convinced appellee disricts to pursue that objective in an effective manner. Regardless of whether these parents are right or wrong in their belief, the State of Washington may not constitutionally subject them, but no other citizens, to political hurdles that impede their achievement of legitimate governmental action consistent with those beliefs. See Part I, supra.

Moreover, there can be no question that it is a legitimate governmental objective for a local school district voluntarily to seek to desegregate its schools through "exercise of its discretionary power to assign students within [its] school system[]." McDaniel v. Barresi, 402 U.S. 39, 42 (1971). See note 7, supra. It is equally well established that "bus transportation [is] a normal and accepted tool of educational policy," Swann v.

Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 29 (1971), which "has long been an integral part of all public educational systems," and that "it is unlikely that a truly effective [desegregation] remedy could be devised without continued reliance upon it." North Carolina Board of Education v. Swann, 402 U.S. 43, 46 (1971).[17/]

17/ In the last decade, the debate over school desegregation has often degenerated into a debate over "forced busing." The term "forced busing" is a misnomer. School districts do not force children to ride a bus, but only to arrive on time at their assigned schools. When that school is beyond walking distance -- for whatever reason -- parents not only do not object to busing, they insist on it, and have for many years. Thus, busing children to school doubled during the 1930s, grew by 70 percent in the 1940s, and increased by more than a third between 1960 and 1970. METROPOLITAN APPLIED RESEARCH CENTER, BUSING TASK FORCE FACT BOOK 22-24 (1972); HEW, National Center for Educational Statistics, Table, in G. ORFIELD, MUST WE BUS? 130 (1978). By 1969, prior to the advent of court-ordered mandatory racial balance plans in the wake of Alexander v. Holmes County Board of Education, 396 U.S.

Although apparently conceding its legitimacy as a governmental objective,

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19 (1969), almost 60 percent of all school-age children were transported to school. DEPARTMENT OF TRANSPORTATION, TRANSPORTATION CHARACTERISTICS OF SCHOOL CHILDREN 7, 10-15 (1972). Even today, over 97 percent of public-school busing is for purposes other than desegregation. The New York Times, Dec. 4, 1980, §1, at 25, Col. 1.

The parental demand for busing stems from the fact that riding a bus to school is substantially safer than walking. A study by the Pennsylvania Department of Education found that children who walk to school are in three times as much danger as those who ride the bus, while the National Safety Council reports that boys are three times, and girls two times, as likely to have an accident walking to school than if they ride in a bus. See U.S. COMMISSION ON CIVIL RIGHTS, PUBLIC KNOWLEDGE AND BUSING OPPOSITION 17 (1973). Other statistics establish that riding the bus is safer than riding in a car. Buses: Backbone of Urban Transit, The American City, Dec. 1974, at 23; NATIONAL ASSOCIATION OF MOTOR BUS OWNERS, BUS FACTS 17 (39th ed. 1972). It is also safer to ride a bus to public school than to private school, primarily because private and parochial schools rely heavily on worn-out buses purchased from public school systems after years of use. School Bus Task Force, in 120 CONG. REC. 8757 (1974). Cf. G. ORFIELD, supra, at 129

the Government nevertheless questions the efficacy of school desegregation for black students, purportedly on the basis of social science data. Brief for the United

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17/ continued

(when a parent removes his child from a desegregated school and places the child in a private school, the length of the child's bus ride increases, on average, by 70 percent).

As is attested by the huge increase in busing over the last 50 years, busing per se does not have any negative educational effects. Nor is there any evidence that attending a school other than the one nearest the student's home negatively affects academic achievement or a school's social climate. Davis, Busing, in 2 R. CRAIN, et al., SOUTHERN SCHOOLS: AN EVALUATION OF THE EMERGENCY SCHOOL ASSISTANCE PROGRAM AND OF SCHOOL DESEGREGATION 118 (1973); Zoloth, The Impact of Busing on Student Achievement, 7 GROWTH & CHANGE 45 (July 1976).

In short, notwithstanding the focus of the opponents of mandatory desegregation on "forced busing," the social scientific literature unequivocally establishes that publically provided transportation to to schools is a safe, indeed necessary, component not only of desegregation efforts but, much more pervasively, of public education in general.

States, at pp. 38-39, n. 39.[18/] However, a recent comprehensive review of the social science literature on public school desegregation establishes that the educational opportunities and achievement of black and other minority students are substantially enhanced by the use of student assignment to achieve racial integragion. Hawley, "The False Premises of Anti-Busing Legislation," testimony before the Subcom. on Separation of Powers, Sen. Com. on the Judiciary, 97th Cong., 1st Sess. (September 30, 1981) (summarizing findings) (hereinafter "Hawley testimony"); W. HAWLEY, et al., 1 ASSESSMENT OF CURRENT KNOWLEDGE ABOUT THE EFFECTIVENESS OF

18/ For the reasons set out in note 15, supra, this query by the Government is irrelevant here. Nonetheless, the suggestion that desegregation is not effective is so thoroughly inaccurate that amicus is compelled to respond.

SCHOOL DESEGRATION STRATEGIES, STRATEGIES FOR EFFECTIVE DESEGREGATION: A SYNTHESIS OF FINDINGS 17-50 (1981) (hereinafter "Synthesis"); C. ROSSELL, et al., 5 ASSESSMENT OF CURRENT KNOWLEDGE ABOUT THE EFFECTIVENESS OF SCHOOL DESEGREGATION STRATEGIES, A REVIEW OF THE EMPIRICAL RESEARCH ON DESEGREGATION: COMMUNITY RESPONSE, RACE RELATIONS, ACADEMIC ACHIEVEMENT AND RESEGREGATION (1981) (hereinafter "Review of Empirical Research"). For the convenience of the Court, copies of these materials, which synthesize the massive body of social science research concerning school districts undergoing actual sustained desegregation over the last 15 years, have been lodged with the Clerk's office.

Briefly stated, the social science review has found, inter alia, that:

1. The use of student assignment as a desegregation method has reduced racial isolation in every school system studied notwithstanding any "white flight."[19/]

2. Desegregation as a general rule cannot be accomplished effectively without using student assignment. "Voluntary" plans, which rely exclusively on student choice as to whether to be reassigned to a desegregated school or a "magnet" school program, have proven to be almost totally ineffective in reducing racial isolation.[20/]

3. Attending racially integrated

19/ Hawley testimony, at 2-9; Synthesis, at 17-34; Rossell, "The Effectiveness of Desegregation Plans in Reducing Racial Isolation, White Flight, and Achieving a Positive Community Response" in Review of Empirical Research, at 1-87.

20/ Id. Compare, e.g., Columbus Board of Education v. Penick, 443 U.S. 449, 459-60 (1979) (desegregation plans that do not involve student assignment have proven ineffective).

schools substantially -- often dramatically -- enhances the academic achievement of black students as revealed by commonly used achievement and I.Q. measures. Gains are greatest when integration starts in the earliest grades. The achievement levels of white students in integregated schools do not suffer, while race relations among all students improve.[21/]

As this research demonstrates, the goal of effective public-school integration is not only a proper governmental objective, but one that the blacks in appellee districts who desire it, and who are unconstitutionally burdened by Initiative 350 in achieving it, correctly perceive as crucial to their future well-being.

21/ Hawley testimony, at 10-13; Crain & Mahard, "Some Policy Implications of the Desegregation-Minority Achievement Literature" in Review of Empirical Research, at 172-208

CONCLUSION

The judgement of the Ninth Circuit should be affirmed.

Respectfully submitted,

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